

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION

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UNITED STATES OF AMERICA and )  
THE STATE OF WISCONSIN, )  
Plaintiffs, ) Civil Action No. 10-C-910  
v. )  
NCR CORPORATION, et al. ) Hon. William C. Griesbach  
Defendants. )  
\_\_\_\_\_  
)

**CERTIFICATION AND DECLARATION OF DAVID WARBURTON**

I, David Warburton, declare as follows:

**Introduction**

1. I am employed by the U.S. Fish and Wildlife Service (“FWS”) at its Twin Cities Ecological Services Field Office in Bloomington, MN. I currently serve as a biologist in the Environmental Contaminants Program of the FWS and have been involved in work for the Lower Fox River and Green Bay Superfund Site (the “Site”) since March 2011.
2. I am familiar with the collection of documents concerning the Site that FWS has compiled, indexed, and maintained in a public reading room at the FWS Green Bay Field Office. I am also familiar with the regular business practices, document creation practices, and document retention practices of FWS. I make this declaration based on personal knowledge, my review of pertinent records, and my consultations with other FWS employees involved with the Site.

3. An index of documents in the FWS public reading room in Green Bay is available in four parts on the FWS webpage for this Site at the following locations:

<http://www.fws.gov/midwest/es/ec/nrda/FoxRiverNRDA/documents/rrindex1.pdf>

<http://www.fws.gov/midwest/es/ec/nrda/FoxRiverNRDA/documents/rrindex2.pdf>

<http://www.fws.gov/midwest/es/ec/nrda/FoxRiverNRDA/documents/rrindex3.pdf>

<http://www.fws.gov/midwest/es/ec/nrda/FoxRiverNRDA/documents/rrindex4.pdf>

4. I make this Certification and Declaration to establish that the documents described in and appended to this Certification are: (1) "public records" within the meaning of Federal Rules of Evidence ("FRE") 803(8), 901(b)(7), and 902(4) and/or "records of regularly conducted activity" within the meaning of FRE 803(6) and FRE 902(11); (2) that the documents are authentic under FRE 901(b)(7), (8), 902(4), (11); and (3) that the documents and statements therein may therefore be offered as evidence of the truth of the matter stated at any trial or hearing in this matter or in a related proceeding under FRE 803(6) and 803(8).

#### **General Certifications**

5. FWS is a "public office" within the meaning of FRE 901(b)(7), a "public office or agency" within the meaning of FRE 803(8), an "agency" of the United States within the meaning of FRE 902(1)(A), and a "business" or "organization" within the meaning of FRE 803(6)(B).

6. FWS regularly performs natural resource damage assessment and restoration activities for releases of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Department of the Interior's Natural Resource Damage Assessment regulations published at 43 C.F.R. Part 11 (the "NRDA regulations"). Since the mid-1990s, FWS has been involved in performing natural resource damages assessment and restoration activities concerning the Site pursuant to the NRDA

regulations. Among other things, FWS and its contractors have prepared a set of natural resource injury determination reports for the Site pursuant to the NRDA regulations, 43 C.F.R. §§ 11.61-11.64.

7. Appended to this declaration are lists of documents that were compiled in the creation of the exhibit list in the above-captioned case.

8. Each of the documents included in Appendix A was created at or near the time of the activities giving rise to the natural resource injury investigation and damage assessment for the Site, and was created by, or from information transmitted by, someone with knowledge of those activities.

9. The documents described herein and listed in the accompanying Appendices A and E were prepared, compiled, and/or received by FWS as part of its natural resource damage assessment efforts for this Site and also transmitted to the United States Environmental Protection Agency (“EPA”) and included in EPA’s Administrative Record for the Site. When FWS prepares, compiles, and/or receives such documents as part of its natural resource damage assessment efforts for a site, FWS regularly maintains such documents and also transmits such documents to EPA when EPA is proceeding with a remedial investigation and feasibility study for the same site.

10. The procedures FWS used for compiling and storing records relating to natural resource damage assessment efforts for this Site are carried out according to the Federal Records Act, 44 U.S.C. Chapter 31, and Federal records retention schedules.

11. The documents described herein and listed in the accompanying appendices are true and correct copies regenerated from the documents that FWS transmitted to EPA.

12. The documents listed in Appendix B are documents either filed or recorded with FWS as required by law, or are public records of FWS that are from FWS offices where documents of this kind are kept.

13. The documents listed in Appendix C are true and correct copies of official records, or copies of a document that was recorded or filed with FWS as authorized by law.

14. The documents listed in Appendix D are documents that are in a condition that creates no suspicion as to their authenticity, were in a place where, if authentic, the documents would likely be, and are at least 20 years old.

15. The documents in Appendix E are true and correct copies of domestic records of acts, events, conditions, or opinions made at or near the time by information transmitted by people with knowledge of the acts, events, conditions, or opinions, that were prepared and kept in the course of the regularly conducted activity of FWS, and making a record is a regular practice of that activity.

16. I have no evidence that the source of, or the method or circumstances of preparation of, the originals of the documents listed in the accompanying appendices indicate a lack of trustworthiness.

#### **Specific Certifications**

17. Exhibit 883 is a true and correct copy of the final report entitled "Injuries to Avian Resources, Lower Fox River/Green Bay Natural Resource Damage Assessment" prepared by Stratus Consulting Inc. on behalf of FWS, U.S. Department of the Interior, and U.S. Department of Justice, dated May 7, 1999 (the "Bird Injury Report" or "Exhibit 883"). The Bird Injury Report is a natural resource injury determination report for the Site prepared by FWS and its contractors pursuant to the NRDA regulations, 43 C.F.R. §§ 11.61-11.64. Exhibit 883 is a

record of FWS that sets out factual findings from a natural resource injury investigation and damage assessment concerning avian resources at the Site, legally authorized by CERCLA and 43 C.F.R. § 11.62(f), and is therefore a public record. Exhibit 883 was filed with FWS and a true and correct copy was subsequently transmitted to EPA for inclusion in the Administrative Record for the Site as authorized by law. A copy of the Bird Injury Report is and has been posted on the FWS webpage for this Site in two parts at:

<http://www.fws.gov/midwest/es/ec/nrda/FoxRiverNRDA/documents/bird.pdf>

[http://www.fws.gov/midwest/es/ec/nrda/FoxRiverNRDA/documents/GBFR\\_NRDA\\_Bird\\_InjuryReport\\_AppBC.pdf](http://www.fws.gov/midwest/es/ec/nrda/FoxRiverNRDA/documents/GBFR_NRDA_Bird_InjuryReport_AppBC.pdf)

FWS also published a notice of issuance of the Bird Injury Report and related reports for the Site prepared under the NRDA regulations in the Federal Register on October 31, 2000, 65 Fed. Reg. 64982 (Oct. 31, 2000). Exhibit 883 is a FWS record of an act, the FWS natural resource injury investigation for avian resources at the Site, made at or near the time by information transmitted by FWS employees and FWS contractor employees with knowledge of the investigation. Exhibit 883 was prepared and kept in the course of the natural resource damage assessment for a Superfund site, a regularly conducted activity of FWS. It is the regular practice of FWS to make a record of such natural resource injury investigation activities performed under the NRDA regulations.

18. Exhibit 891 is a true and correct copy of the final report entitled "Injuries to Fishery Resources, Lower Fox River/Green Bay Natural Resource Damage Assessment" prepared by Stratus Consulting Inc. on behalf of FWS, U.S. Department of the Interior, and U.S. Department of Justice, dated November 8, 1999 (the "Fish Injury Report" or "Exhibit 891"). The Fish Injury Report is a natural resource injury determination report for the Site prepared by FWS and its contractors pursuant to the NRDA regulations, 43 C.F.R. §§ 11.61-11.64. Exhibit

891 is a record of FWS that sets out factual findings from a natural resource damage investigation into fishery resources at the Site, legally authorized by CERCLA and 43 C.F.R. § 11.62(f), and is therefore a public record. Exhibit 891 was filed with FWS and a true and correct copy was subsequently transmitted to EPA for inclusion in the Administrative Record for the Site as authorized by law. A copy of the Fish Injury Report is and has been posted on the FWS webpage for this Site at:

<http://www.fws.gov/midwest/es/ec/nrda/FoxRiverNRDA/documents/fish.pdf>

FWS also published a notice of issuance of the Fish Injury Report and related reports for the Site prepared under the NRDA regulations in the Federal Register on October 31, 2000, 65 Fed. Reg. 64982 (Oct. 31, 2000). Exhibit 891 is a FWS record of an act, the FWS natural resource damage investigation into fishery resources at the Site, made at or near the time by information transmitted by FWS employees and FWS contractor employees with knowledge of the investigation. Exhibit 891 was prepared and kept in the course of the natural resource damage assessment for a Superfund site, a regularly conducted activity of FWS. It is the regular practice of FWS to make a record of such natural resource injury investigation activities performed under the NRDA regulations.

19. Exhibit 1149 is a true and correct copy of the final report entitled “Injuries to Surface Water Resources, Lower Fox River/Green Bay Natural Resource Damage Assessment” prepared by Straus Consulting Inc. on behalf of FWS, U.S. Department of the Interior, and U.S. Department of Justice, dated November 8, 1999 (the “Surface Water Injury Report” or “Exhibit 1149”). The Surface Water Injury Report is a natural resource injury determination report for the Site prepared by FWS and its contractors pursuant to the NRDA regulations, 43 C.F.R. §§ 11.61-11.64. Exhibit 1149 is a record of FWS that sets out factual findings from a natural resource

damage investigation into surface water resources at the Site, legally authorized by CERCLA and 43 C.F.R. § 11.62(b), and is therefore a public record. Exhibit 1149 was filed with FWS and a true and correct copy was subsequently transmitted to EPA for inclusion in the Administrative Record for the Site as authorized by law. A copy of the Surface Water Injury Report is and has been posted on the FWS webpage for this Site at:

<http://www.fws.gov/midwest/es/ec/nrda/FoxRiverNRDA/documents/wsinjury.pdf>

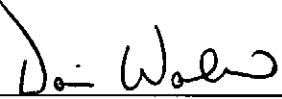
FWS also published a notice of issuance of the Surface Water Injury Report and related reports for the Site prepared under the NRDA regulations in the Federal Register on October 31, 2000, 65 Fed. Reg. 64982 (Oct. 31, 2000). Exhibit 1149 is a FWS record of an act, the FWS natural resource injury investigation into surface water resources at the Site, made at or near the time by information transmitted by FWS employees and FWS contractor employees with knowledge of the investigation. Exhibit 1149 was prepared and kept in the course of the natural resource damage assessment for a Superfund site, a regularly conducted activity of FWS. It is the regular practice of FWS to make a record of such natural resource injury investigation activities performed under the NRDA regulations.

20. Exhibit 1286 is a true and correct copy of a portion of P.H. Glatfelter Company's responsive submissions to a CERCLA § 104(e) Information Request issued by FWS, bates stamped by Glatfelter GN3039814 – GN4004616. True and correct copies of the documents received by FWS from Glatfelter were subsequently provided to EPA Region 5 for inclusion in the Administrative Record for the Site as authorized by law. The portions of Exhibit 1286 at images 427-449 are also copies of documents that are over 20 years old and were submitted to FWS under the legal requirements of CERCLA § 104(e) in response to requests for historic information and documents relating to PCB discharges.

21. Exhibit 1308 is a true and correct copy of the Riverside Paper Corporation's (now CBC Coating, Inc.) narrative responsive submission to a CERCLA § 104(e) Information Request issued by FWS. True and correct copies of the documents received by FWS from CBC Coating were subsequently provided to EPA Region 5 for inclusion in the Administrative Record for the Site as authorized by law.

Pursuant to 28 U.S.C. § 1746, I certify and declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 11, 2013

  
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DAVID WARBURTON

## **APPENDIX A**

Documents created at or near the time of the activities giving rise to the natural resource injury investigation and damage assessment for the Site, created by, or from information transmitted by, someone with knowledge of those activities:

1. Exhibit 883;
2. Exhibit 891;
3. Exhibit 1149.

## **APPENDIX B**

Documents either filed or recorded with FWS as required by law, or are public records of FWS that are from FWS offices where documents of this kind are kept:

1. Exhibit 883;
2. Exhibit 891;
3. Exhibit 1149;
4. Exhibit 1286;
5. Exhibit 1308.

## **APPENDIX C**

Documents that are true and correct copies of official records, or copies of a document that was recorded or filed with FWS as authorized by law:

1. Exhibit 883;
2. Exhibit 891;
3. Exhibit 1149;
4. Exhibit 1286;
5. Exhibit 1308.

## **APPENDIX D**

Documents that are in a condition that creates no suspicion as to their authenticity, were in a place where, if authentic, the documents would likely be, and are at least 20 years old:

1. Exhibit 1286 (noted portions).

## **APPENDIX E**

Documents that are true and correct copies of domestic records of acts, events, conditions, or opinions made at or near the time by information transmitted by people with knowledge of the acts, events, conditions, or opinions, that were prepared and kept in the course of the regularly conducted activity of FWS, and making a record is a regular practice of that activity:

1. Exhibit 883;
2. Exhibit 891;
3. Exhibit 1149.